



August 12, 2002

Ms. Mary Kay Fischer
City Attorney
City of Killeen
101 North College
Killeen, Texas 76541

OR2002-4412

Dear Ms. Fischer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166954.

The City of Killeen (the "city") received a request for the complete personnel file of Officer Robert Burke. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.119, and 559.003 of the Government Code, in addition to section 143.089(g) of the Local Government Code and section 773.091 of the Health and Safety Code. We have considered the exceptions you claim and reviewed the submitted information.

We first consider your assertion that section 552.101 in conjunction with section 143.089(g) of the Local Government Code applies to the documents that you have marked in attachment E. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the

employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee, Loc. Gov't Code § 143.089(a) and another that may be maintained by the city's fire and police departments, Loc. Gov't Code § 143.089(g). Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including commendations, congratulations, and honors given to a police officer by the public or the police department as well as periodic evaluations of the police officer by a supervisor and letters, memoranda, or documents from the employing department detailing misconduct that resulted in disciplinary action by the employing department in accordance with chapter 143 must be released to the public unless the information comes within one of the Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

The city asserts that the department maintains both a section 143.089(a) file and a section 143.089(g) file. We note that the department is not authorized to maintain a file pursuant to section 143.089(a). Only the civil service director may maintain a file under section 143.089(a). The city also states that it maintains a human resources file. We point out that the city may not maintain a human resources file in addition to a section 143.089(a) file as chapter 143 provides for two files only. Accordingly, we will refer to the section 143.089(a) file and the human resource files collectively as the section 143.089(a) file.

The city states that the first three groupings of documents in attachment E are maintained in the Killeen Police Department's (the "department") "internal, 143.089(g) file." The city also states that Officer Burke was suspended per section 143.056 pending resolution of criminal charges. We note that suspension is a disciplinary action under chapter 143. *See* Local Gov't Code § 143.056; Attorney General Opinion JC-0257 (2000). Therefore, all information relating to this suspension must also be maintained by the civil service director in the section 143.089(a) file. *See* Local Gov't Code § 143.089(a)(2). Likewise, one of the documents that the city asserts is maintained in the department's section 143.089(g) file relates to commendations, congratulations, and honors under chapter 143. This document must also be maintained in the civil service director's section 143.089(a) file. *See* Local Gov't Code § 143.089(a)(1). On the other hand, the documents contained in attachment E that you state are maintained in the department's section 143.089(g) file that do not relate to disciplinary action or to commendations, congratulations, and honors under chapter 143 must be withheld under section 552.101. *See* Local Gov't Code § 143.089(g).

We now consider whether the information relating to Officer Burke's suspension and commendation under chapter 143 that must be maintained in the civil service director's section 143.089(a) file may be withheld under section 552.103. We will consider at the same time whether the documents you already maintain in the civil service director's section 143.089(a) file (which, as noted, we will consider as incorporating what you call the "human resources" file) that you have marked as attachments E, F, G, H, I, and J are excepted under section 552.103. Upon review, we find that attachment E contains a final decision of the Texas Workforce Commission that we have marked. This decision is made public by statute and must be released to the requestor. Gov't Code § 2001.004 (state agency shall make available for public inspection all final orders, decisions, and opinions); Open Records Decision No. 161 (1977) and authorities cited therein (information made public by statute not protected by "litigation" exception); *see also* Gov't Code § 552.022(a)(12) ("final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases" not excepted from public disclosure unless made confidential by law). We also find that the documents relating to Officer Burke's suspension and his evaluations are completed evaluations and a completed investigation, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from disclosure unless expressly confidential under other law or as provided by section 552.108. You do not assert that section 552.108 applies to the submitted information. Furthermore, section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" for purposes of section 552.022.¹ *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision No. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

to protect a governmental body's position in litigation and does not itself make information confidential). Accordingly, we have marked the documents that are subject to section 552.022(a)(1) and must be released. We find, however, that portions of these documents are confidential by operation of "other law" and thus are not required to be released under section 552.022(a)(1).

First, some of the documents that are or must be maintained in the civil service director's section 143.089(a) file that are subject to 552.022(a)(1) contain driver's license numbers. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers we have marked in attachment E under section 552.130.

Second, some of the documents that are or must be maintained in the civil service director's section 143.089(a) file that are subject to 552.022(a)(1) contain personal information protected under section 552.117. Officer Burke's social security number, home address and telephone number contained in these documents in attachment E are subject to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Attachment I shows that Officer Burke timely requested that his personal information remain confidential. Accordingly, you must withhold the personal information in attachment E that we have marked.

We now consider whether section 552.103 applies to the documents not subject to release under section 552.022(a) that either are or must be included in the civil service director's section 143.089(a) file that you have marked as attachments E, F, G, H, I, and J. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a)

exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In Open Records Decision No. 638 (1996); this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. You have submitted information showing that the requestor has given the city initial notice of a potential claim against the State of Texas, and you state that the notice meets the requirements of the TTCA. Thus, you have demonstrated that litigation is reasonably anticipated for purposes of section 552.103(a). Having reviewed the information, we conclude that it relates to the anticipated litigation. You may therefore withhold attachments E-J pursuant to section 552.103(a) with the exception of the documents you must release under section 552.022 of the Government Code.

We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the city must withhold the information in attachment E contained in the department's personnel file under section 143.089(g) with the exception of the documents that we have marked that relate to disciplinary action or commendation under chapter 143, which must also be maintained in the civil service director's section 143.089(a) file. We find that the city may withhold the remaining documents that are or must be maintained in the civil service director's section 143.089(a) file under section 552.103 with the exception of the completed investigation and evaluation that we have marked in attachment E, which must be released under section 552.022(a) and under section 2001.004 of the Government Code. However, the city must withhold some portions of the documents subject to section 552.022(a)(1) as they are made confidential by "other law." First, the city must

withhold the driver's license numbers that we have marked in attachment E under section 552.130. Second, the city must withhold the personal information we have marked in attachment E under section 552.117. As we have made our determination under sections 552.022, 552.101, and 552.103, we need not consider your remaining arguments.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

²Because we make a determination under section 552.103, we do not address your additional arguments against disclosure. We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. If you receive a subsequent request for the information, you should reassert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 166954

Enc. Submitted documents

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(w/o enclosures)